NO. 84048-2

SUPREME COURT
OF THE STATE OF WASHINGTON

MITCH DOWLER and IN CHA DOWLER, individually and as limited guardian ad litem for NAM SU CHONG, *et al.*,

Appellants,

v.

CLOVER PARK SCHOOL DISTRICT NO. 400,

Respondent.

AMICUS CURIAE BRIEF OF DISABILITY RIGHTS WASHINGTON AND THE ARC OF WASHINGTON STATE IN SUPPORT OF APPELLANTS

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I. INTERESTS AND IDENTITY OF AMICI CURIAE

Amicus Disability Rights Washington is the organization designated by federal law and the Governor of Washington to provide protection and advocacy services to people in Washington with mental, developmental, physical, and sensory disabilities. *See* Motion to Appear as *Amici Curiae* and Declaration of Mark Stroh ("Stroh Decl.") in support thereof. Disability Rights Washington has a Congressional mandate to advocate on behalf of people with disabilities through the provision of a full range of legal assistance including legal representation, regulatory and legislative advocacy, and education and training. Stroh Decl., ¶ 2.

Disability Rights Washington has extensive experience representing the interests of people with a variety of disabilities. Disability Rights Washington fields hundreds of calls annually from individuals with legal problems related to their disabilities, including issues relating to special education, torts, and discrimination. *Id.* at ¶ 5. We have represented individual clients in special education and discrimination matters, and recently started a project focusing on transition services for special education students. *Id.*

Proposed *Amicus* The Arc of Washington State (also "Arc"), formerly the Association for Retarded Citizens, is a nonprofit, tax-exempt corporation organized under the laws of Washington State for the purposes

of providing information and advocacy on behalf of children and adults with intellectual disabilities and their families. Founded in 1936, The Arc of Washington State is the oldest parent advocacy organization for children and adults with intellectual disabilities in the country.

The Arc of Washington State and its twelve local chapters have a long history of advocating for the rights of children in our public education system. The Arc of Washington State helped educate and advocate both the state legislature and Congress in passing the original Education of the Handicapped Act[1] in 1970 and the Education for All Handicapped Children Act[2] in 1975, which gave children with intellectual disabilities the right to education. The Education for All Act was the direct precursor to the Individuals with Disabilities Education Act. ("IDEA").

The Arc of Washington State continues to influence state and federal legislation that supports the rights of children and adults who have a developmental disability. The Arc of Washington State believes this case to be of special significance because it involves applying Arc-supported legislation to certain rights of the individuals whom The Arc of Washington State represents.

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[1] 84 Stat. 175

[2] 89 Stat. 773.

II. STATEMENT OF THE CASE

Amici Disability Rights Washington and The Arc of Washington State join generally in Appellants' Statement of the Case, but wish to highlight some of Appellants' specific tort and discrimination allegations and important parts of this case's procedural history.

A. TORT AND DISCRIMINATION ALLEGATIONS

Appellants claim Respondent committed many tortious acts. For example, the Respondent is alleged to have failed to prevent sexual assaults of students with disabilities by other students. Brief of Appellants at 4; CP 83, 85. Other examples include the Respondent's failure to prevent students being pushed, shoved, grabbed, snatched at, and thrown into a locker. Brief of Appellants at 8; CP 79, 80, 84. School district staff also allegedly force-fed students food they were not permitted to eat because of disabilities. Brief of Appellants at 9; CP 83. Students were punished for uncontrollable bowel movements. Brief of Appellants at 10; CP 83. School district employees threw balls at a child and placed a plastic bag over a child's head. Brief of Appellants at 10; CP 80, 83, 84.

The Appellants also claimed the Respondent discriminated against them. Such claims include the Respondent's staff calling the students derogatory names like "little devil," "slave," "demon," and "monster" and making fun of their disabilities. Brief of Appellants at 10; CP 79-81, 83-

85. The Appellant parents also asserted claims for emotional distress, loss of enjoyment of life, humiliation, and wage loss. CP 87.

B. PROCEDURE

Appellants filed suit against Respondent on June 13, 2006, alleging multiple claims that arose in the school setting. Brief of Respondent at 3; CP 3-19. Among the claims were violation of the Washington Law Against Discrimination, RCW 49.60, and the torts of negligence, negligent/intentional infliction of emotional distress, outrage, assault, and battery. CP 85-87. The trial court granted Appellants' motion to withdraw "all claims related to education" and all claims for discrimination under RCW 49.60 on November 30, 2007. Reply Brief of Appellants at 3 (citing CP 1355-58). The court also granted the Respondent's motion for summary judgment and dismissed all discrimination claims and all claims related to educational services for failure to exhaust administrative remedies. Brief of Appellants at 13. The court then requested additional briefing to determine if any plaintiff had strictly tort-based claims for physical or verbal abuse not involving education and that could not be remedied through the administrative process. *Id.* A subsequent reconsideration hearing in December 2007 resulted in the dismissal of all claims—a dismissal later vacated. *Id.* at 14. Finally, Respondent filed another summary judgment motion, and the trial

court dismissed *all* Appellants' claims for failure to exhaust administrative remedies on December 11, 2009. *Id* at 19.

III. ARGUMENT

A. IDEA DOES NOT MANDATE EXHAUSTION OF ALL CLAIMS THAT ARISE IN A SCHOOL SETTING

Any child who experiences a disability and attends public school may be exposed to situations that could generate a variety of claims against the school district. Some of the child's claims may be related to the child's special education program under the Individuals with Disabilities Education Act ("IDEA"). These claims must be exhausted through IDEA's administrative procedures before the filing of a civil lawsuit. Some of the child's claims may involve injuries that have nothing to do with that program and would not be subject to exhaustion.

The determination of whether a student's claim is subject to IDEA's exhaustion requirement need not be over-complicated. The appropriate analysis for each claim is established by statute, clarified by the seminal Supreme Court case establishing the role of the courts in enforcing the precursor to IDEA, and subsequently refined by other federal courts. As described in further detail below, the analysis begins by analyzing each claim separately to determine whether the injury is educationally-related – i.e. involves some component of the child's

individualized education program ("IEP") – or is non-educationally related. Courts have acknowledged the inherent unfairness that would exist if children with disabilities were forced to exhaust administrative remedies for non-educationally-related injuries while children without disabilities can take their claims straight to court:

> The Court construes these claims as arising from non-educational injuries, irrespective of the fact that they occurred in an educational setting and were allegedly perpetrated by educators against a student. If Jane Doe were *not* a disabled student, there would be no administrative barrier to her pursuit of these claims.

Sagan v. Sumner County Bd. of Educ., 726 F. Supp. 2d 868, 882-83 (M.D. Tenn. 2010) (emphasis in original).

When trial courts determine whether a claim is educational or non-educational, they should follow the claim-by-claim analysis in *Sagan* and other federal cases. This analysis examines the source and nature of each of the child's alleged injuries, not just whether the injury occurred at a school. Below, *amici* describe several cases where torts, discrimination, and personal claims of parents that occur at school are non-educational and are thus not subject to the exhaustion requirements of IDEA.

1. THE PURPOSE OF IDEA IS TO ENSURE THAT CHILDREN WITH DISABILITIES HAVE ACCESS TO FREE APPROPRIATE PUBLIC EDUCATION

IDEA is a comprehensive educational scheme that gives students with disabilities a right to a free appropriate public education. *Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1300 (9th Cir. 1992). Among the express purposes of IDEA are:

> (1)(A) to ensure that all children with disabilities have available to them a free appropriate public education..., (3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities...; and (4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

20 U.S.C. § 1400(d).

To achieve these purposes, IDEA conditions the provision of federal financial assistance on whether a state has "in effect policies and procedures to ensure," among other things: "free appropriate public education" ("FAPE") is available to all children with disabilities; an individualized education program ("IEP") is developed, reviewed, and revised for each child with a disability; children with disabilities are educated in the least restrictive environment possible, and to the maximum extent appropriate with children who do not have disabilities; and procedural safeguards (as provided in 20 U.S.C. § 1415) to provide for the

above and to ensure that evaluation and placement of children with disabilities for services is not discriminatory. *See* 20 U.S.C. § 1412.

2. *IDEA PROVIDES AN ADMINISTRATIVE PROCESS TO RESOLVE EDUCATIONALLY-RELATED DISPUTES*

IDEA provides parents and students the rights to substantially participate in the creation and evaluation of an IEP and to resolve complaints through mediation or an administrative "due process hearing." *See, e.g.*, 34 C.F.R §§ 300.501-512. The disputes that are subject to the resolution procedures in IDEA are specifically enumerated. 20 U.S.C. § 1415(b)(6)(A) provides that these procedures are to be used "with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education ["FAPE"] to such child...." The scope of FAPE is limited to "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 201, 102 S. Ct. 3034, 73 L.Ed.2d 690 (1982). The administrative process does not, accordingly, encompass all aspects of a child's experience in the school setting.

After resolution of an IDEA complaint, any aggrieved party may bring a civil action in state or federal court. 20 U.S.C. § 1415(i)(2). In the

seminal case establishing the standard for judicial review of an IDEA complaint, the United States Supreme Court clarified the permitted content of such a complaint by focusing on the authority of a reviewing court. *Rowley*, 458 U.S. at 206-07. In *Rowley*, the Court established the standard for a reviewing court that continues to be followed today:

> "First, has the State complied with the procedures set forth in [IDEA[3]]? And second, is the individualized educational program developed through [IDEA]'s procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more."

J. L. v. Mercer Island Sch. Dist., 592 F.3d 938, 947 (9th Cir. 2010) citing *Rowley*, 458 U.S. at 206-07 (footnotes, citations, and internal quotes omitted).

Rowley established the standard for judicial review of an IDEA complaint, prohibiting courts from reviewing the substance of a complaint and focusing only on whether the IEP was reasonably calculated to allow the child to receive educational benefits. *Rowley*, 458 U.S. at 206-07. The corollary of this limitation is necessarily a similar limitation on the administrative body, restricting its authority to a determination of whether the IEP was reasonably calculated to enable the child to receive

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[3] The *Rowley* court was ruling on a precursor to IDEA, the Education of the Handicapped Act, 84 Stat. 175. *Rowley*, 458 U.S. at 179-80.

educational benefits.[4] If an administrative body were not limited to educationally-related claims, it would become the final arbiter of claims over which it has little or no expertise (e.g. tort claims and discrimination claims). The result would be that those children who are intended to be protected by IDEA would instead be subjected to procedural hurdles when seeking to enforce rights unrelated to the provision of FAPE.

3. *NON-EDUCATIONALLY RELATED CLAIMS ARE NOT SUBJECT TO IDEA'S ADMINISTRATIVE PROCESS AND MAY BE PURSUED WITH A CIVIL LAWSUIT*

Courts attempting to determine whether claims are subject to exhaustion under IDEA have focused primarily on whether the claims are for injuries that can be redressed by IDEA's administrative procedure. *See, e.g.*, 20 U.S.C. § 1415(l); *Sagan*, 726 F. Supp. 2d at 878; *Robb v. Bethel Sch. Dist. # 403*, 308 F.3d 1047, 1048 (9th Cir. 2002); *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268, 1274 (10th Cir. 2000). Often, this is framed as whether an injury is "educational" or "non-educational." *See* infra parts A(3)(a)-(c). The trial court looks at the "source and nature of the alleged injuries" in the complaint. *Padilla*, 233 F.3d at 1274. In making this determination, courts make an evaluation on a claim-by-claim basis –

[4] Justice White's dissent critiqued the majority's opinion for narrowing a reviewing court's inquiry to "procedural matters." *See Rowley*, 458 U.S. at 216-218.

allowing them to distinguish those claims that are educationally-related from those that merely occur in on school grounds.

For example, in *Sagan*, the district court conducted a detailed count-by-count analysis for a series of claims, dismissing a claim for violation of the Americans with Disabilities Act ("ADA") for failure to exhaust IDEA procedures, but allowing tort claims related to unlawful and unreasonable use of force. *Sagan*, 726 F. Supp. 2d at 890-91. In reviewing the claims, the court found certain injuries were not educational "irrespective of the fact that they occurred in an educational setting and were allegedly perpetrated by educators against a student." *Id.* at 883. The *Sagan* court, while not ruling that such a factor is dispositive of whether IDEA exhaustion is required, found it useful to consider that if the plaintiff "were *not* a disabled student, there would be no administrative barrier to her pursuit of these claims" (emphasis in original). *Id.*

Respondent seems to reject this claim-by-claim analysis and argues that if a plaintiff has *any* injury that could be addressed by administrative procedures to *any* degree, then the plaintiff needs to exhaust. Brief of Respondent at 18. Respondent cites *Payne, Kutasi*, and *Robb* for this proposition. *Id. Amici* agree with Appellants that Respondent misapprehends the holdings of these cases. *See* Brief of Appellants at 33-40, Reply Brief of Appellants at 7-10. *Robb* and *Kutasi* involved

educationally-related claims and did not involve the types of physical harm or discrimination that is alleged in this case. *Kutasi v. Las Virgenes Unified Sch. Dist.*, 494 F.3d 1162, 1170 (9th Cir. 2007) (where all claims were educational, IDEA exhaustion was required); *Robb*, 308 F.3d at 1053-54 (where a student was removed from a classroom for "peer tutoring" without supervision of a teacher and plaintiffs sought money damages, exhaustion was required because this was an educationally-related claim). *Payne* is distinguishable because it involved the use of a safe room that was incorporated into the child's IEP, unlike the allegations in this case, which are unrelated to the IEP process. *Payne v. Peninsula Sch. Dist.*, 598 F.3d 1123, 1125 *rehearing en banc granted*, 621 F.3d 1001 (9th Cir. 2010). Importantly, the Ninth Circuit has agreed to rehear this split decision case *en banc*.

The intent in *Robb* and its progeny is to prohibit plaintiffs from re-characterizing their claims (by simply seeking remedies unavailable under IDEA) in an attempt to avoid exhaustion requirements. Consistent with *Robb*, the trial court's focus is on whether the *injuries* for which plaintiffs seek relief could be redressed to any degree by the IDEA's administrative

procedure, not on the relief sought. *Kutasi*, 494 F.3d at 1163-64 (citing *Robb*, 308 F.3d at 1050).[5]

As the cases below demonstrate, courts cannot just dismiss all of a plaintiff's claims because there is one educationally-related claim. When conducting a claim-by-claim analysis to determine if a claim is non-educationally related, courts look at whether:

> (1) it would be futile to use the due process procedures ...; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; or (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought)....

Hoeft, 967 F.2d at 1303-04 (emphasis omitted) (citing H.R. Rep. No. 296, 99th Cong., 1st Sess. 7 (1985)).

a. Tort claims are non-educationally-related and do not need to be exhausted under IDEA. Several courts have held that claims for injuries resulting from the torts of assault and infliction of emotional distress are examples of claims that do not need to be exhausted under the IDEA because these torts are not connected to education, irrespective of

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[5] Courts also have prohibited plaintiffs timing their complaints in an effort to re-characterize claims as futile under the IDEA. See *Ruecker v. Sommer*, 567 F. Supp. 2d 1276, 1296 (D. Or. 2008) (recognizing that whether a student has graduated is not dispositive of whether exhaustion is required). Nonetheless, in enforcing this prohibition, courts have emphasized the limits of IDEA's administrative process. *See Sagan*, 726 F. Supp. 2d at 878-9 (listing examples of cases where exhaustion was futile because the IDEA was not suited to remedy past instances of physical injury).

whether they occurred in a school setting. It would be fundamentally unfair to require children with disabilities to exhaust when there are no administrative barriers for children without disabilities who choose to pursue tort claims that occur in a school. *See Sagan*, 726 F. Supp. at 883.

Rape and other sexual assaults are examples of torts that do not need to be exhausted under the IDEA because these injuries are non-educational. Respondent does not challenge this, admitting that "sexual abuse of a student, standing by itself and with no nexus to IDEA, would not require exhaustion." Brief of Respondent at 31. *Lopez v. Metropolitan Government of Nashville and Davidson County* came to the same conclusion. 646 F. Supp. 2d 891 (M.D. Tenn. 2009). *Lopez* held that injuries resulting from a student's alleged rape by an older student were non-educational and did not require exhaustion. *Id.* at 908. *See also M.Y. v. Special Sch. Dist. No. 1*, 519 F. Supp. 2d 995, 999-1003 (D. Minn. 2007) (where school district bus driver allegedly sexually assaulted student, injuries alleged were non-educational and no exhaustion was required because there were no IDEA remedies to redress the injury).

Courts have also been reluctant to require exhaustion where students have sought damages for past physical injuries and emotional distress that occurred in schools. In *Witte v. Clark County School District*, tort allegations against the district included force-feeding a student

oatmeal when he was allergic to it, choking the student, taking the child down to the ground as punishment for involuntary movements or tics, depriving the student of meals, threatening the child, and name-calling. 197 F.3d 1271, 1273 (9th Cir. 1999). The Ninth Circuit held the student's claims of physical abuse and injuries did not have to be exhausted because these injuries were non-educational and other educational issues had been resolved through IEP process. *Id.* at 1276.

Similarly, the Seventh Circuit held that where a student with muscular dystrophy was forced to overexert himself during his physical education program, which caused muscle weakness and permanent kidney damage, the student did not have to exhaust under the IDEA. *McCormick v. Waukegan Sch. Dist. # 60,* 374 F.3d 564, 566 (7th Cir. 2004). These injuries were non-educational in nature and the IDEA did not provide a remedy for his injuries because he was seeking a remedy for *past* physical and emotional harm. *Id.* at 569. *See also Sagan*, 726 F. Supp. 2d at 882-83 (IDEA exhaustion not required because alleged injuries were non-educational where child with Down Syndrome was subjected to physical abuse including: being pushed into a classroom and left alone and unattended for 20 minutes; being subjected to constant abusive comments from a teacher; having a teacher place sharp objects under the child's fingernails for discipline; being required to smell her own feces after an

accident; and being pulled into a standing position, resulting in bruising); *John G. v. Northeastern Educ. Intermediate Unit 19*, 490 F. Supp. 2d 565, 571, 582-83, 587 (M.D. Penn. 2007) (where teacher of child with autism hit child, pulled his hair, and verbally abused him, court held IDEA exhaustion was not required for torts of assault, battery, and intentional infliction of emotional distress).

b. Discrimination claims are non-educationally-related.

Statutes such as the ADA, Section 504 of the Rehabilitation Act, and the Washington Law Against Discrimination protect people with disabilities against many types of discrimination, including discrimination that may take place at a public school setting. *See* Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.*; Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*; Washington Law Against Discrimination, RCW 49.60 *et seq.* Courts have held students do not need to administratively exhaust under the IDEA in several discrimination cases. For example, in *M.P.*, a student's claims arose after the school nurse disclosed the student's mental health disability, which led to other students verbally and physically harassing him. *M.P. v. Independent Sch. Dist. No. 721*, 439 F.3d 865, 866 (8th Cir. 2006). The Eighth Circuit held the school district's failure to protect the student from unlawful discrimination based on disability under Section 504 is a claim wholly unrelated to the IEP process, and did not

require exhaustion. *Id.* at 868. *See also Witte*, 197 F.3d at 1275-76 (ADA and Rehabilitation Act claims related to physical, psychological and verbal abuse did not have to be exhausted under the IDEA).

The Tenth Circuit reached a similar conclusion in *Padilla*. In this case, a student placed in windowless closet and restrained in a stroller without supervision tipped over and hit her head, resulting in a skull fracture and exacerbation of seizure disorder. *Padilla*, 233 F.3d at 1271. She could not attend school the rest of the year and the district failed to provide any homeschooling. *Id.* The student's mother filed an ADA complaint for damages for excluding her child from participation in publicly funded general education and special education programs based on her disability. *Id.* The Tenth Circuit held that where the complaint was limited to redress for past harm for injuries, no exhaustion under IDEA was required. *Id. at* 1274-75.

c. Parents' personal tort and discrimination claims are not educationally-related and do not require exhaustion under IDEA. In cases where parents have alleged their own personal injuries and sued for damages, courts have not required exhaustion under IDEA. *Blanchard v. Morton Sch. Dist.*, 420 F.3d 918 (9th Cir. 2005). In *Blanchard*, a mother sued the school district for emotional distress caused by the school district in providing special education services to her son. *Id.* at 920. She sought

money damages for emotional distress and lost wages. *Id.* The Ninth Circuit held that the mother did not have to exhaust because remedies available under IDEA include educational services for children with disabilities, remedies that were not adequate for the mother's claims. *Id.* at 921.

B. THE TRIAL COURT ERRED WHEN IT DISMISSED THE STUDENTS' AND PARENTS' TORT AND DISCRIMINATION CLAIMS

In this case, the trial court did not appear to conduct a claim-by-claim analysis of whether the claims were educationally- or non-educationally related. At one point during summary judgment proceedings, the court reasoned that "if there were any educational issues, or if there were a mixture of educational issues and abuse or discrimination, then summary judgment dismissal would be granted." Brief of Respondent at 6 (citing RP, Nov. 14, 2007, at 28:24-29:9; RP, Dec. 14, 2007, at 2:20-3:8). This type of analysis violates the summary judgment standard. CR 56(c). If any of the Appellants' claims were clearly non-educational in nature, those claims should have survived summary judgment. Similarly, any claims that had questions of material

fact also should have survived. Only clearly educationally-related claims that remained should have been disposed of for failure to exhaust.[6]

Several of the claims in this case were similar to the case law examples of non-educationally-related claims above and should not have been dismissed. The most egregious example of this relates to Appellants' sexual assault claims. CP 83, 85; *see Lopez*, 646 F. Supp. 2d at 908; *M.Y.*, 519 F. Supp. 2d at 999-1003. Respondent states "sexual abuse of a student, standing by itself and with no nexus to IDEA, would not require exhaustion." Brief of Respondent at 31. It is appalling to imply sexual assault could ever have a "nexus" to the provision of FAPE or a child's IEP. Any claims related to sexual assault should not have been dismissed.

Similarly, any claims involving assaults or intentional harmful touching (pushing, shoving, force-feeding, placing a plastic bag over a child's head, etc.) should not have been dismissed because they were either non-educational or there was a question of material fact about whether they were non-educational. CP 79, 80, 83, 84. Discrimination claims involving name-calling and bullying are examples of other claims that are non-educationally-related. Finally, the trial court also erred in

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[6] Here, the trial court granted Appellant's motion to withdraw "all claims related to education" on November 30, 2007. Reply Brief of Appellants at 3 (citing CP 1355-58). Therefore, there were no educationally-related claims left for the subsequent summary judgment motions, although it is unclear exactly which claims those were.

dismissing the parents' claims for monetary damages and lost wages because parents' personal injuries cannot be redressed by the IDEA. CP 87; *Blanchard*, 420 F.3d at 921.

Because the trial court failed to conduct a claim-by-claim analysis, the order dismissing all counts for failure to exhaust under the IDEA should be reversed. Each claim should be analyzed individually to determine whether the Appellants seek relief for injuries that could be redressed to any degree by the IDEA's administrative procedure.

IV. CONCLUSION

For the foregoing reasons *Amici* Disability Rights Washington and The Arc of Washington State respectfully request that the Court reverse the trial courts' December 2009 summary judgment ruling and remand this matter for further proceedings.

Respectfully submitted this 18th day of April, 2011.

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